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Nos. 75-277 and 75-515

In the Supreme Court of the United States

OCTOBER TERM, 1975

FRED J. ZEEHANDELAAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Solicitor General,
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Washington, D.C. 20530.

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Petitioner claims that the grand jury was deceived into returning an indictment against him and that the redaction of the indictment by the district court denied him the right to be tried upon the indictment as found by the grand jury. Petitioner also claims that prosecutorial misconduct denied him a fair trial, and that the district court on remand illegally increased his sentence.

Petitioner is a dealer in wild animals. In a previous trial in the United States District Court for the Southern District of New York he was convicted of making a false statement, in violation of 18 U.S.C. 1001, in connection with an application to the Department of the Interior to import cheetahs into the United States. That conviction was reversed on appeal.[1] At the trial in that case the government offered evidence of similar acts by petitioner in the form of testimony from Melvin Lovell, an amateur wild animal breeder, that petitioner had suggested two illegal means by which Lovell could obtain cheetahs in circumvention of the restrictions of the Endangered Species Conservation Act of 1969[2] (by siphoning off animals legally imported under a previously granted Interior Department authorization, or by backdating contracts of sale to invoke hardship exemptions provided by the Act). Petitioner testified that Lovell, and not he, had proposed such illegal conduct.

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[1] The court of appeals ruled (its decision is reproduced at Appendix D of the petition in No. 75-277) that the indictment charging petitioner did not specify whether his false statement consisted of his representation that he had a contract for the purchase of cheetahs before they were noticed for listing as an Endangered Species (which petitioner argued he in fact had) or of his backdating certain documents (which he does not dispute, Pet. 6). *United States* v. *Zeehandelaar*, 498 F.2d 352 (C.A. 2).

[2] 16 U.S.C. 668aa *et seq.*, superseded by the Endangered Species Act of 1973, 16 U.S.C. (Supp. IV) 1531 *et seq.*

The instant case arises on the basis of this testimony, for which petitioner was charged and convicted, after jury trial in the Southern District of New York, of making a false material declaration at a prior trial, in violation of 18 U.S.C. 1623.[3] He was sentenced to one year of unsupervised probation and, as a condition of probation, ordered to pay $5,000 to the Department of the Interior for use in connection with the preservation of endangered species. The court of appeals affirmed his conviction without opinion but remanded to the district court for correction of sentence (Pet. No. 75-277 App. A). On remand the district court removed the condition of probation and imposed a $5,000 fine. The court of appeals affirmed the resentencing (Pet. No. 75-515 App. D).[4]

1. Petitioner's first contention is that, by editing his testimony from the previous trial, the government misled the grand jury into returning an indictment against him.

It is undisputed that petitioner and Lovell had two conversations, both on the same day, one by telephone and the other face-to-face at the Arizona Inn in Tucson. At the previous trial, Lovell had testified that petitioner suggested illegal evasions of

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[3] Petitioner was also reindicted for making a false statement to the Department of the Interior, but this charge was dismissed by the government at the close of trial in the instant case.

[4] Petitioner seeks review of the judgment affirming his conviction in No. 75-277 and of the judgment affirming the resentencing in No. 75-515.

the Endangered Species Conservation Act during the latter meeting, and that the telephone conversation was innocuous. Petitioner said that the meeting was innocuous and that Lovell suggested the illegality over the phone. At trial of the instant case Lovell repeated his version; petitioner did not testify.

Petitioner's testimony from the previous trial appeared in an edited version in the indictment. This version did not indicate that a face-to-face conversation followed the telephone call, but instead made it appear that petitioner's testimony about the telephone conversation included both the allegation of Lovell's illegal proposal and his own general denial of ever having suggested illegality himself.[5] Petitioner asserts (Pet. 9) that this editing deceived the grand jury into believing "that it was indicting the petitioner for perjurious testimony relating to his version of the telephone conversation" alone and that the indictment was therefore a nullity.

This claim is wholly without basis. The substance of the conflict between the testimony of the two men was over who, if either, had proposed unlawful

[5] Petitioner's testimony at the previous trial, and the edited version of that testimony contained in the indictment, are shown on the chart at Appendix E of the petition in No. 75-277. We acknowledge, as we did on appeal (see our appellate brief at page 13, note), that complete accuracy would have been served had asterisks indicated the deletion of irrelevant matter. The failure so to indicate, however, was by no means calculated or intended to deceive the grand jury, as a review of the omitted testimony, none of which is favorable to petitioner or harmful to the government, will show. Nor was the grand jury in fact deceived, see text *infra*.

acts. Petitioner was charged with falsely declaring that Lovell had proposed criminal conduct and that he himself had not. Whether the falsity occurred during one or the other of two conversations, held within hours of each other, was of no significance. Thus there is no reasonable basis for saying that the grand jury was "deceived" into returning the indictment against petitioner.

Moreover, the corollary of petitioner's argument —that had the grand jury been expressly apprised of the full extent of petitioner's testimony it would not have indicted—is baseless, since the testimony omitted from the indictment contains no suggestion whatever that the testimony charged as perjury was not perjurious (and petitioner does not argue otherwise).

In short, petitioner's argument that the wording of the indictment deceived the grand jury is not sufficient to overcome the presumption of regularity concerning grand jury proceedings. *Costello* v. *United States*, 350 U.S. 359; *United States* v. *Nunan*, 236 F. 2d 576, 594 (C.A. 2), certiorari denied, 353 U.S. 912; *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 39 (C.A. 8), certiorari denied, 373 U.S. 904. The government did nothing more than delete certain portions of petitioner's testimony so as to eliminate irrelevant material. This was entirely proper and did not invalidate the indictment. *United States* v. *Dunham Concrete Products, Inc.*, 475 F. 2d 1241, 1248-1249 (C.A. 5), certiorari denied, 414 U.S. 832; *United States* v. *Rook*, 424 F.2d 403, 405 (C.A. 7), certiorari denied, 398 U.S. 966.

2. Petitioner claims next that the redaction of the indictment by the district court deprived him of his Fifth Amendment right to be tried on the indictment returned by the grand jury. But the redaction did not materially alter the indictment any more than the edited version appearing in the indictment altered petitioner's trial testimony in any relevant manner.

The redaction by the court came about as a result of petitioner's motion to dismiss the indictment on the ground that its allegations were too imprecise to enable him to prepare a defense (A21-A22).[6] In response, the government proposed deleting those portions of the indictment that were irrelevant to the charge that petitioner had testified falsely when he said that Lovell and not he had proposed illegal evasion of the Endangered Species Conservation Act. Petitioner now argues that in redacting the indictment to give it greater precision the trial court impermissibly amended it, in derogation of this Court's decisions in *Ex Parte Bain*, 121 U.S. 1, and *Stirone* v. *United States*, 361 U.S. 212.

Those cases do not forbid immaterial alteration or narrowing of indictments, however, and thus do not support petitioner's argument. As the Court said in *Stirone* (361 U.S. at 215-217), "Ever since [*Bain*] was decided in 1887 it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the grand jury itself. * * * The *Bain* case,

[6] The indictment as redacted also appears at Appendix E of the petition in No. 75-277. "A" refers to petitioner's Appendix filed in the court of appeals.

which has never been disapproved, stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."

The material here omitted by the district court can in no wise be said either to have broadened the charge against petitioner or to have added charges not made in the indictment as it originally was issued. Only inconsequential, background testimony was deleted, and the district court's decision to strike this prefatory matter was simple recognition that it was not materially false and that, consequently, it was unnecessary to the indictment. In so doing the district court was not impermissibly "second-guessing" the grand jury. The stricken testimony was superfluous, its elimination did not create a material change in the indictment, and there is no likelihood whatever that the indictment would not have been voted without it. *See United States* v. *Cirami*, 510 F.2d 69, 73 (C.A. 2); *United States* v. *Colasurdo*, 453 F. 2d 585 (C.A. 2), certiorari denied, 406 U.S. 917.

Moreover, contrary to petitioner's assertion, the excision of this surplusage cannot be said to have misled the trial jury as to the context of the questions and answers set forth as perjurious, since petitioner's testimony at his first trial concerning his dealings with Lovell was read to the trial jury in its entirety (A977-A985).[7]

[7] For this reason also there is no merit to petitioner's suggestion (Pet. 18, note) that the redaction prejudiced him in connection with the testimony of Frank Gilbert, an associate

In sum, the redaction of the indictment was "merely a matter of form" (*Russell* v. *United States*, 369 U.S. 749, 770) and did not alter the focus of the issues to be resolved. That focus was initially and remained throughout the trial on the question whether petitioner testified falsely at his previous trial when he said that Lovell and not he proposed that certain illegal actions be taken in order to import cheetahs into the United States. The truth or falsity of petitioner's testimony was the question to be resolved by the jury, not whether the critical statements in issue had occurred at one conversation with Lovell or at another several hours later.

3. Petitioner's assertions of prosecutorial misconduct (Pet. 25-26) are also wide of the mark. In explaining why Lovell and Gilbert remembered their encounter with petitioner, the prosecutor stated (A 1145):

> And why do they remember that [conversation]? Because these men have no criminal record, no prior involvement with the law, they are intelligent people, and for somebody to come up to them and propose that they do something illegal was surprising and shocking, and they remember it.

of Lovell's. Petitioner had said that Lovell had suggested illegal evasion of the law during the telephone conversation, to which Gilbert was not a party, but the question by the prosecutor whether Gilbert recalled such a suggestion emanating from Lovell was designed to test his recollection whether Lovell had at any time proposed backdating documents to deceive the Department of the Interior. In any event, petitioner's entire testimony in this regard was read to the jury, and Gilbert's testimony thus did not "falsely appear" to contradict petitioner.

Although neither witness had been asked specifically at trial whether he had a criminal record, the prosecutor's statement was a reasonable inference from testimony given. Defense counsel had questioned the government witnesses on various alleged minor misdeeds but had failed to uncover any criminal record.[8] Nevertheless, when defense counsel objected the prosecutor cautioned the jury that "more correctly put, [there was] an absence of proof" (A1146) of any criminal records, thereby curing any error there might have been.

Nor did the prosecutor comment upon petitioner's failure to testify. From 30 pages of transcript petitioner culls three remarks of the prosecutor upon which he bases his claim:

> What is the version of what happened by the witnesses who testified here in front of you? [A1132-A1133.]
>
> So the case boils down to, really, do you believe these witnesses who testified here? [A1142.]

[8] For example, defense counsel questioned Lovell about his practicing as an electrical engineer despite his lack of an engineering degree (A524-A525) and his alleged failure to make child support payments (A540-A544). The defense also pointed out that Sue Pressman, another government witness, had received mail addressed to her as Dr. S. Pressman although she did not hold either an M.D. or Ph.D. degree (A1011-A1017).

> The Government submits to you that based on the credibility of the witnesses in this case, none of which were contradicted in any way whatsoever * * * [A1152.]

There was nothing in these isolated comments which the jury would naturally or necessarily interpret as a comment on petitioner's silence. See *United States* v. *Dioguardi*, 492 F.2d 70, 81-82 (C.A. 2), certiorari denied, 419 U.S. 873. Petitioner had already given his version of events at the earlier trial, and the purpose of the trial was to contrast and compare that version with the version told by the government's witnesses. All of the comments referred to above did no more than invite this comparison. The reference to the absence of contradiction was not a comment on petitioner's silence, for his version of events clearly did contradict the testimony of the government's witnesses; rather, this remark was intended to draw the jury's attention to the consistency of testimony given by those witnesses. Any misapprehension that the jury might have had on this account was in any event corrected by the district court's instruction that no inference was to be drawn against petitioner for his failure to testify (A1185).

4. Petitioner's final claim is that the district court on remand illegally increased his sentence. Initially the court sentenced petitioner to one year of unsupervised probation and, as a condition of probation, ordered him to pay $5,000 to the Department of the Interior for use in connection with the Endangered Species program. The court of appeals ruled

(Pet. App. A, p. 2a) that "[s]uch a forced contribution is an improper sentence" and remanded for resentencing with the instruction that "any fine imposed upon such resentencing may not exceed $5,000, the amount of the contribution originally imposed." The district court thereupon imposed a $5,000 fine, as the court of appeals had said it might.

Contrary to petitioner's claim (No. 75-515, p. 6), the resentencing did not violate *North Carolina* v. *Pearce*, 395 U.S. 711. That case held that due process requires "that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial" and that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" (*id.* at 725-726). Here there can be no question of vindictiveness, for petitioner's punishment was not increased in the sense contemplated by *Pearce*.[9] Following the first sentencing petitioner faced a choice of paying $5,000 or sacrificing his probation to possible imprisonment. Following the resentencing petitioner remained in effect in the same position. The sole practical difference lay not in the punishment meted out but in the recipient of the money. It is no more onerous for

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[9] Moreover, the revision of the sentence was within parameters dictated by the court of appeals and thus did not reflect the concern to which *Pearce* was addressed—possible vindictiveness by a trial judge resentful over a successful appeal. Cf. *Colten* v. *Kentucky*, 407 U.S. 104.

petitioner to pay $5,000 to the general treasury than to pay the same sum to the Department of the Interior and his argument that his sentence was illegally increased is thus without merit.[10]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[10] *Ekberg* v. *United States*, 167 F.2d 380 (C.A. 1), cited by petitioner (No. 75-515, p. 6), is inapplicable. There a conviction on one count was reversed and the court of appeals said that the sentences on two other counts, valid when imposed, could not subsequently be altered. Here, by contrast, the court of appeals remanded, not so that a sentence valid when imposed might be altered, but for correction of an improper sentence on the only count on which petitioner was convicted. Nothing in *Ekberg* would prohibit the resentencing here.

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APPENDIX E

The following is defendant's actual testimony, as it appears in the official transcript of the first trial (72 Cr. 1328), intact, unedited and unaltered, of which only a disjointed, incomplete portion is set forth in indictment 74 Cr. 938 (A. 6-8), returned by the October, 1974 Grand Jury.

(B. 379—li. 6) Q. Whom did you phone and what number did you call?

A. I telephoned Mr. Lovelle at this number, 6—area code 602-937-4330.

(B. 379—li. 9) Q. And what conversation did you have with him?

A. I introduced myself. I said "Mr. Lovelle, I have just been advised that you called my office and you told my office this same message"—and I repeated the same contents—"I am calling you back. What can I do for you?"

And he then said—do I continue?

The Court: The entire conversation, if you would.

A. He then said "What is the approximate price?"

And I said "The approximate price is between"—as I recall at this moment—"17 and $1900 each delivered to the United States."

He then said again "I visited U.S.D.I. yesterday and gave the same story."

I then questioned his qualifications to obtain what he described to be a zoological import permit.

I told him that a zoological import permit, which is not the same as a commercial import permit, would

(B. 380—li. 2) require certain qualifications, facilities, et cetera, et cetera, facilities, housing, for the U.S.D.I. to grant him such a zoological import permit.

He then said that he was already aware of such possibility of not being qualified for such zoological permit.

(B. 380—li. 8) He then asked me whether there was any other way of getting cheetahs, of a different kind of a permit.

I then told him that it was my intention to apply for a commercial permit for 20 cheetahs for Wild Kingdom in Orlando, Florida, later in the summer.

I told him also that it is the privilege of the permittee, in this case the permittee of the commercial permit, to ask if the permit has been issued, request permission for whatever reason there might be——

Q. From whom?

A. From U. S. D. I. From U. S. D. I., for whatever reason it might be a year later, six months later, to sell one or more of the permitted animals, in this case cheetahs, to somebody else.

That privilege is printed on the permit.

I told him also——

(B. 380—li. 24) Q. What is the substance of the information?

(B. 380—li. 25) A. I told him also that I didn't consider such per-

(B. 381—li. 2) mission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovelle, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the Endangered Species List.

Since we didn't have such a contract, since he didn't and I didn't have such a contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.

He then asked me what if I sign a contract

(B. 381—li. 12) dated in March. And I said "Sorry, that can't be done."

(B. 381—li. 13) The conversation ended by me telling him that since he is in Phoenix, and identified myself as being in Tucson, Arizona, which is only 65 miles, 70 miles away, I advised him that I would be on the program in the Phoenix Zoo on an organized tour on Tuesday, April 18, and I suggested to him that if he wants to talk to me again he might take the opportunity of looking me up while we were at the Phoenix Zoo.

(B. 381—li. 21) That was the end of the conversation.

Q. The telephone conversation?

A. The telephone conversation.

Q. All right. Now, you didn't see him on April 15, you say?

(E. 382—li. 2) A. No, sir.

Q. When did you see him, if you saw him at all?

A. He came to visit me, to the best of my recollection, on April 18 at approximately 12:55 p.m.

Q. Can you state what directs your attention to the visit being on April 18 at 12:55 p.m. or thereabouts?

A. Yes, sir. We were about to leave——

Q. Who is the "we"?

A. The delegates, including myself, were about to leave at 1 p.m. by chartered bus for that visit in the Phoenix Zoo.

Q. And had you made an appointment to see Mr. Lovelle on either Saturday, April 15, or on Tuesday, April 18, 1972?

A. No, sir, except that I suggested that he might want to visit me in Phoenix, but i twas not an appointment.

(B. 383—li. 2) Q. What happened before you got on the bus with the other delegates to go to the Phoenix Zoo?

A. A few minutes prior to boarding the bus one delegate—and I don't recall his name—came to me, and I was waiting in the lobby, "There are two men to see you."

I followed the delegate into the lobby and he pointed the two men out to me. One of these two gentlemen was, as it now appears, the same gentleman who was here, Mr. Lovell. The other one, I still do not recollect his name. They were standing in the lobby.

They said, "I want to see you."

I said, "This is strange because I'm going to be leaving for the Phoenix Zoo in a few minutes. You could have saved yourself trouble if you came to the Phoenix Zoo this afternoon."

They said, no, they have to be here for reasons.

I said, "I have little time. I don't want to miss my charter bus."

He then, again, brought up the subject, very briefly, whether I could in some way help him either import cheetahs or sell cheetahs under a permit for him, saying something.

I told him we discussed it already at greater lengths in the past Saturday and there was nothing

(B. 384—li. 2) further I could do at that time.

Then—I was kind of made for the inconvenient time—I apologized because I had never seen these gentlemen before. I apologized for my erratic behavior, and then I rushed out and made the bus.

(B. 384—li. 7) Q. Did you ever hear from or see Mr. Lovell again?

A. Never.

Q. Did you ever state to Mr. Lovell that there were two ways he could get a cheetah through you, and then did you say to him that one way was that you had an order of cheetah coming in for Lion Country Safari and that you could siphon off two animals from that order for them or you could date back the order? Did you ever say that in substance or in words?

(B. 384—li. 16) A. No, sir.

The edited, altered and recomposed version of defendant's testimony on the trial of Indictment 72 Cr. 1328, as set forth in the indictment submitted by the Government to and as returned by the October, 1974 Grand Jury (A. 6-8).

(B. 379—li. 6) Q. Whom did you phone and what number did you call?

A. I telephoned Mr. Lovelle at this number, 6—area code 602-937-4330.

(B. 379—li. 9) Q. And what conversation did you have with him?

[Without any indication of their omission, the first 22 lines of the defendant's answer to the above question were deleted by the prosecutor from the indictment. Those 22 lines begin at B. 379, line 10 and end at B. 380, line 7.]

(B. 380—li. 8) A. . . . He then asked me whether there was any other way of getting cheetahs, of a different kind of permit.

I then told him that it was my intention to apply for a commercial permit for 20 cheetahs for Wild Kingdom in Orlando, Florida, later in the summer.

I told him also that it is the privilege of the permittee, in this case the permittee of the commercial permit, to ask if the permit has been issued, request permission for whatever reason there might be——

Q. From whom?

A. From U.S.D.I. From U.S.D.I., for whatever reason it might be a year later, six months later, to sell one or more of the permitted animals, in this case cheetahs, to somebody else.

That privilege is printed on the permit.

I told him also——

(B. 380—li. 24) Q. What is the subject of the information?

(B. 380—li. 25) A. I told him also that I didn't consider such permission to be likely to be given to me after I had the Kingdom permit because I would have to provide a contract or an order for Mr. Lovelle, entered into for whatever he wanted, prior to the effective date that the cheetah was placed on the Endangered Species List.

Since we didn't have such a contract, since he didn't and I didn't have such contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.

He then asked me what if I sign a contract dated in March. And I said "Sorry, that can't be

(B. 381—li. 12) done."

[Without any indication of their omission, the last nine lines of the defendant's above answer were deleted by the prosecutor from the indictment. Those lines begin at B. 381, line 13 and end at B. 381, line 21.]

(B. 384—li. 9) Q. Did you ever state to Mr. Lovell that there were two ways he could get a cheetah through you, and then did you say to him that one way was that you had an order of cheetah coming in for Lion Country Safari and that you could siphon off two animals from that order for them or you could date back the order? Did you ever say that in substance or in words?

(B. 384—li. 16) A. No, sir.

The final version of defendant's testimony as recited in the indictment, on which defendant was tried, after amendment by the Court, on the Government's motion, which defendant opposed and sought dismissal instead (A. 9-10; A. 21, A. 113).

(B. 379—li. 6) Q. Whom did you phone and what number did you call?

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Since we didn't have such a contract, since he didn't and I didn't have such contract, I told him it was unlikely that such permission, after I received the permit of, let's use the word, switching animals, would be granted.

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(B. 384—li. 9) Q. Did you ever state to Mr. Lovell that there were two ways he could get a cheetah through you, and then did you say to him that one way was that you had an order of cheetah coming in for Lion Country Safari and that you could siphon off two animals from that order for them or you could date back the order? Did you ever say that in substance or in words?

(B. 384—li. 16) A. No, sir.